IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM COLLISON,	:	CIVIL NO. 97-3026
	:	CRIMINAL NO. 92-583-02
Petitioner,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. September 22, 1997

I.

On November 13, 1993, the petitioner pled guilty to a one count information charging him with conspiracy to manufacture phenyl-2-propanone, a Schedule II non-narcotic controlled substance, to manufacture methamphetamine, and to possess with intent to distribute approximately three grams of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841 and 846. On May, 24, 1993, the Court sentenced petitioner to 120 months imprisonment, 5 years supervised release, a fine of $15,000.00, and a special assessment of $50.00. Petitioner did not file a direct appeal to vacate the judgment of conviction and sentence.

On April 28, 1997, petitioner, acting pro se, filed the instant motion pursuant to 28 U.S.C. § 2255 to vacate the judgment of conviction and sentence based upon three grounds: (1) the guilty plea was not knowing and voluntary since, according to petitioner, the Court did not properly advise him under Rule 11 of the Federal Rules of Criminal Procedure of the ten-year

mandatory minimum sentence for the offense; (2) the Court erred by applying the ten-year mandatory minimum sentence without making any determination as to the isomeric type of methamphetamine involved in the offense, D-methamphetamine or L-methamphetamine; and (3) counsel rendered ineffective assistance at sentencing by allegedly (a) failing to advise petitioner about the type of methamphetamine involved in the offense; (b) failing to advise petitioner about the ten-year mandatory minimum sentence for the offense; and (c) failing to file a direct appeal after petitioner instructed him to do so.[1]

On June 3, 1997, the government filed a response to petitioner's § 2255 habeas petition contending that the petition should be dismissed for two reasons: (1) the § 2255 habeas petition was untimely because it was filed beyond the one-year statute of limitations for habeas corpus petitions mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214; and (2) the

[1]This specific allegation appears nowhere in the habeas petition which was filed with the Court. In his habeas petition, petitioner merely alleges that "[a]t no time during the plea hearing did defense counsel advise defendant as to . . . [t]hat he was not appealing the conviction and sentence in regard to the points set forth [in the petition]. It was defendant's understanding that he was going to appeal." However, in the forms for filing his petition (as opposed to the habeas petition itself), in response to question #8--Did you appeal from the judgment of conviction?--petitioner checked the box marked "No" and wrote beside that checkmark "requested same but Attorney not do it."

claims raised by petitioner were unsuccessful.[2]

On July 11, 1997, after reviewing the submissions from petitioner and the government, the Court issued an order permitting the parties to file affidavits and supplemental memoranda as to petitioner's contention that his attorney failed to file an appeal after petitioner had instructed him to do so. The Court has reviewed the submissions of the parties including the supplemental memorandum filed by petitioner's counsel in this habeas action, who was retained by petitioner since the entry of the Order of July 11, 1997, along with the accompanying affidavit of petitioner, and the government's supplemental response and accompanying affidavit of Timothy Murname, Esq., petitioner's prior counsel. For the reasons that follow, the Court will dismiss the habeas petition as untimely without an evidentiary hearing.

II.

Prior to the passage of the AEDPA, a petitioner had the right to file a § 2255 petition at any time after a conviction became final. The AEDPA, however, amended § 2255 to require that habeas petitions concerning federal convictions, brought pursuant to 28 U.S.C. § 2255, and habeas petitions concerning state convictions, 28 U.S.C. §§ 2244, 2254, must be filed within one-

[2]Additionally, the government has argued that petitioner's claims are procedurally defaulted since petitioner has not shown cause and prejudice for his failure to raise these claims on direct appeal. Because the Court will dismiss petitioner's habeas motion under § 2255 on other grounds, it need not reach the procedural default issue.

year from the date on which the judgment of conviction becomes final. See 28 U.S.C. §§ 2244, 2254-55.[3] The AEDPA's provisions took effect on April 24, 1996, the date that the President signed the AEDPA. See United States v. Urrutia, No. 97-7951, (3d Cir. September 15, 1997) (unpublished) (citing Gozlon Peretz v. United States, 498 U.S. 395, 404 (1991) (other citations omitted).

In United States v. Urrutia, No. 97-7951 (3d Cir. September 15, 1997) (unpublished), the Third Circuit held that,"for a [habeas] petitioner [who has filed a motion to vacate the judgment of conviction and sentence under 28 U.S.C. § 2255] whose

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[3]The relevant text of 28 U.S.C. § 2255 reads as follows:

> (d)(1) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

In this case, since petitioner has not made any allegations which could trigger the commencement of the one-year period under 28 U.S.C. § 2255 (d)(2)-(4), the only factor implicated here is § 2255 (d)(1), i.e. the date on which the judgment and conviction became final.

conviction became final prior to the effective date of the AEDPA, [28 U.S.C. § 2255] allows a reasonable period of time, not to exceed one year [from the date the AEDPA took effect on April 24, 1996], for the filing of the habeas corpus petition." Urrutia, No. 97-7951, slip op. at 2 (emphasis added). Accordingly, [habeas petitioners] whose convictions became final on or before April 24, 1996, [must have] file[d] their § 2255 motions before April 24, 1997." U.S. v. Simmons, 111 F.3d 737, 746 (10th Cir. 1997) (citing Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1997)). While the Third Circuit's decision in Urrutia is in the form of an unpublished memorandum, and therefore, is not binding precedent upon the Court in the present case, see Tobin v. Haverford School, 936 F.Supp. 284, 293 (E.D. Pa. 1996) (citing Internal Operating Procedures of the United States Court of Appeals for the Third Circuit § 5.3) ("An opinion which appears to have value only to the trial court or the parties is ordinarily not published"), aff'd. 118 F.3d 1578 (3d Cir. 1997)), the Court has no difficulty following it since Urrutia is in accord with the decisions of all other courts of appeals which have addressed the issue. See Calderon v. U.S. District Court for the Central District of California, 112 F.3d 386, 389 (9th Cir. 1997); United States v. Simmonds, 111 F.3d 737, 745-46 (10th Cir. 1997); Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997); and Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir.) (en banc), rev'd. on other grounds, 117 S.Ct. 2059 (1997).

Here, petitioner's conviction became final on May 24, 1993,

almost four years prior to the effective date of the AEDPA. Since petitioner did not file the instant motion for habeas relief until April 28, 1997, five days after the expiration of the one-year limitation provided in the AEDPA, the Court finds that the instant petition is not timely filed.[4]

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[4]Even if the Court were to treat the motion as timely filed, the Court would still deny the motion without an evidentiary hearing since petitioner's claims are (1) not cognizable under § 2255; and (2) are meritless.

When a motion is made under 28 U.S.C. § 2255 the question of whether to order an evidentiary hearing is committed to the sound discretion of the district court. See U.S. v. Day, 969 F.2d 39, 41 (3d Cir. 1992) (citing Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). In exercising such discretion, the Court "must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record, id. at 41, and "must order an evidentiary hearing unless the motion and files and records of the case show conclusively that the movant is not entitled to relief." Id. (other citations omitted).

Title 28 U.S.C. § 2255 permits a prisoner in custody under sentence of a federal court to move the Court to correct an erroneous sentence. "Section 2255 does not afford a remedy for all errors that may be made at trial or at sentencing." United States v. Essig, 10 F.3d 968, 977 (3d Cir. 1993). Under § 2255, the sentencing court is authorized to discharge or resentence a defendant if it concludes that it "was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." 28 U.S.C. § 2255. The Supreme Court has found that a claim of legal error, unlike a claim of jurisdictional or constitutional error, is not cognizable under § 2255, unless the alleged legal error raises "a fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)); See also U.S. v. Essig, 10 F.3d 968, 977 n. 25 (3d Cir. 1993); Oliver v. U.S., 961 F.2d 1339, 1341 (7th Cir. 1992) ("[a claim for collateral relief is cognizable under § 2255 only if the alleged error is "'jurisdictional, constitutional, or [raises] a fundamental defect which inherently results in a complete miscarriage of justice.'") (citing Davis v. United States, 417 U.S. 333, 346 (1974) (other citations omitted)).

Petitioner first contends that his guilty plea was not knowing and voluntary. According to petitioner, the Court violated Rule 11 of the Federal Rules of Criminal Procedure by failing to repeat the prosecutor's statement twice placed on the record at the guilty plea hearing that the offense to which he was pleading guilty carried a ten-year mandatory minimum sentence.

For a § 2255 petitioner to successfully challenge a guilty plea based upon a violation of Rule 11, he must establish that "the violation amounted to a jurisdictional or constitutional error, or that the alleged legal error resulted in a complete miscarriage of justice or in a proceeding inconsistent with the demands of a fair procedure." United States v. Timmreck, 441 U.S. 780, 783 (1979); See also United States v. Cleary, 46 F.3d 307, 310-12 (3d Cir. 1995). To bring a successful challenge under Rule 11 in a § 2255 habeas petition, petitioner must also establish that "he was prejudiced in that he was unaware of the consequences of his plea, and, if properly advised, would not have pleaded guilty." Timmreck, 440 U.S. at 784.

First, the Court finds that this claim is not cognizable under § 2255 since it does not fit within the standard announced in Timmreck. Here, petitioner nowhere alleges that the he was unaware of the ten-minimum mandatory minimum sentence for the drug offense to which he pled guilty. Nor has petitioner alleged that if he had been properly advised of the mandatory minimum sentence, he would not have pled guilty to the drug offense.

Second, even if this claim was cognizable under § 2255, the Court finds that it would fail on the merits. Rule 11(c)(1) of the Federal Rules of Criminal Procedure mandates that before accepting a guilty plea, the district court must address the defendant personally in open court and inform him of, and determine that he understands, the mandatory minimum penalty for his offense, if any, and the maximum possible penalty, including the effect of any special parole or supervised release term. See Fed. R. Crim. P. 11(c)(1). Rule 11(h) provides that any variance from the procedures outlined in Rule 11 "which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h). Petitioner admitted at the plea hearing that he had read, understood, and signed the plea agreement which clearly stated that the mandatory minimum sentence for the offense was ten years. Moreover, he does not dispute that in response to the Court's inquiry, the prosecutor twice placed on the record the mandatory minimum to which the Court was obligated to sentence the petitioner. The Court has reviewed the transcript of the plea hearing and finds that the procedures followed were in accord with Rule 11. Moreover, the Court finds that any variation from

the requirements of Rule 11 which may have occurred was harmless error. See Fed. R. Crim. P. 11(h).

Petitioner next contends that the Court erred by applying the ten-year mandatory minimum sentencing provision under 21 U.S.C. § 841 since the government did not show that the type of methamphetamine he possessed was D-methamphetamine as opposed to L-Methamphetamine. In United States v. DeJulius, 1997 WL 434865 (3d Cir. Aug. 5, 1997), however, the Third Circuit rejected a similar argument in the context of a habeas petition under § 2255 and found instead that the statutory mandatory minimum sentence under § 841 makes no distinction between D-Methamphetamine and L-Methamphetamine. Accordingly, even assuming that petitioner's argument on this point is cognizable under § 2255, the Court finds that it is meritless and therefore must fail.

Finally, petitioner contends that his counsel's failure to advise him at sentencing, or request that the Court advise him, on several issues at sentencing, constituted ineffective assistance. Petitioner specifically claims that counsel was ineffective for failing to advise him as to (1) the type of methamphetamine involved in the offense; (2) the mandatory minimum sentence for the offense; and (3) by failing to file a direct appeal which challenged his judgment of conviction and sentence.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that to prevail on an ineffective assistance of counsel claim, the defendant must prove: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687-96 (1984). Moreover, in the context of guilty plea challenges based on claims of ineffective assistance, in order to satisfy the prejudice requirement,"the defendant must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); See also Dickerson v. Vaughn, 90 F.3d 87, 92 (3d Cir. 1996). Furthermore, "[a] defendant alleging ineffective assistance of counsel in the guilty plea context must make more than a bare allegation that but for counsel's error he would have pleaded not guilty and gone to trial." Parry v. Rosemeyer, 64 F.3d 110, 118 (3d Cir. 1995), cert. denied, 116 S.Ct. 734 (1996). The burden of proving a claim of ineffective assistance of counsel rests upon the petitioner. See Government of Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985).

As to petitioner's claim that counsel was ineffective for

failing to advise him as to the type of methamphetamine involved in the offense for sentencing purposes, the Court concludes that the claim must fail. Since petitioner received the ten-year mandatory minimum sentence for the offense, and, as explained above, the type of methamphetamine was therefore irrelevant, counsel's failure to advise him as to the type of methamphetamine cannot serve as a basis for showing that counsel's performance was deficient or prejudiced the petitioner. See United States v. Strauss, Civ. A. No. 95-1407, slip. op. at 2-3 (denying habeas petition under § 2255 and finding that counsel was not ineffective for failing to raise issue of methamphetamine type as such is irrelevant when defendant sentenced to statutory minimum) (other citations omitted) (E.D. Pa. 1995) (Waldman, J.)).

As to petitioner's claim that counsel was ineffective for allegedly incorrectly advising him that he would receive a sentence of fifteen months as opposed to the actual sentence imposed of ten years, the Court concludes that the claim must also fail. The plea agreement signed by petitioner clearly states that the defendant understood, agreed and had explained to him by counsel the possible range of imprisonment, including the ten-year mandatory minimum sentence and the maximum sentence. Moreover, the record also shows that petitioner was advised in open court at the plea hearing that the mandatory minimum sentence was ten years. Even assuming that counsel's performance was deficient insofar as he allegedly failed to advise petitioner as to the mandatory minimum and maximum sentences prior to the plea hearing, petitioner cannot show that he was prejudiced under the second-prong of Strickland since the record shows that he was informed as to the possible range of sentences by the plea agreement and again at the plea hearing. See United States v. Foster, 68 F.3d 86, 88 (4th Cir. 1995) (where trial court informed defendant at plea hearing of potential sentence he faced, defendant could not show prejudice under Strickland by any misinformation counsel had provided him).

Finally, as to petitioner's bare allegation that he instructed counsel to file a direct appeal and that counsel refused to do so, the Court concludes that the claim is also without merit. To be sure, in Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994), the Seventh Circuit found that "when a [petitioner] requests his attorney to take an appeal and his attorney fails to do so, counsel is considered to be ineffective [assistance] per se. . ." Castellanos, 26 F.3d at 719. Relying upon Castellanos, the Court afforded petitioner an opportunity to file an affidavit to provide a factual basis in support of this contention along with a and supplemental memorandum. See Castellanos, 26 F.3d at 720 (remanding to district court to determine if evidentiary hearing was warranted under § 2255 as to

III.

For the above reasons, the Court will deny petitioner's motion to vacate, set aside, or correct his sentence pursuant 28 U.S.C. § 2255 without an evidentiary hearing.

An appropriate order will issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM COLLISON,	:	CIVIL NO. 97-3026
	:	CRIMINAL NO. 92-583-02
Petitioner,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	

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petitioner's allegation that he had asked counsel to file a direct appeal and that counsel had refused to do so). In this circuit, however, the Court of Appeals has counselled district courts that "bald assertions and conclusory allegations do not warrant sufficient grounds to require an evidentiary hearing." Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991).

In his two-page affidavit, however, petitioner merely states as follows: "I believe that had my attorney filed an appeal, the Circuit Court would have granted me relief and forced the government to file a motion to allow the sentencing court to depart below the guideline and the mandatory minimum." Accordingly, the Court finds that petitioner's naked assertion that he instructed counsel to file an appeal and that counsel refused to do so, which is without any support in the record, does not warrant an evidentiary hearing.

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Respondent. :

ORDER

And now, this **22nd** day of **September, 1997**, upon consideration of the pro se motion by William Collison to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (doc. no. 36), and the response of the United States (doc. no. 38), and the supplemental memorandum and response and the accompanying affidavits filed by the parties (doc. nos. 45, 47, 48, and 49), it is hereby **ORDERED** that the motion is **DENIED WITHOUT AN EVIDENTIARY HEARING.**

AND IT IS SO ORDERED.

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EDUARDO C. ROBRENO, J.